IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ALBERT L. FREEMAN, Plaintiff,	)	
v.	)	1:00CV00665
DUKE POWER COMPANY, a division Of DUKE ENERGY CORPORATION, and DUKE ENERGY CORPORATION, Defendants.	)	
ALBERT L. FREEMAN, Plaintiff,	)	
v.	)	1:02CV00630
CINDY THAXTON, an individual, and GREGORY KWASCHA, an individual, Defendants.	)	

JUDGMENT

Tilley, Chief Judge

For the reasons stated in a contemporaneously filed Memorandum Opinion, in the 1:00CV00665 action, Plaintiff's Motion to Remand [Doc. #7] is DENIED, Defendant's Motion to Dismiss [Doc. #11] is GRANTED, Plaintiff's Motion to Exclude Evidence and for Leave to Take Discovery [Doc. #25] is MOOT, Plaintiff's Motion to Amend the Complaint [Doc. #28] is DENIED, Defendant's Motion to Consolidate [Doc. #31] is MOOT.

In the 1:02CV00630 case, Defendant's Motion to

Dismiss [Doc. #3] is GRANTED, Defendant's Motion to Consolidate [Doc. #5] is MOOT, and Plaintiff's Motion to Remand [Doc. #8] is DENIED.

This is the 15th day of August, 2003.

/s/
United States District Judge

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

ALBERT L. FREEMAN, Plaintiff, v. DUKE POWER COMPANY, a division Of DUKE ENERGY CORPORATION, and DUKE ENERGY CORPORATION, Defendants.	)	1:00CV00665
ALBERT L. FREEMAN, Plaintiff, v. CINDY THAXTON, an individual, and GREGORY KWASCHA, an individual, Defendants.	)	1:02CV00630

MEMORANDUM OPINION

Tilley, Chief Judge

In the 1:00CV00665 action, the following motions are currently pending before the court: Plaintiff's Motion to Remand [Doc. #7], Defendant's Motion to Dismiss [Doc. #11], Plaintiff's Motion to Exclude Evidence and for Leave to Take Discovery [Doc. #25], Plaintiff's Motion to Amend the Complaint [Doc. #28], Defendant's Motion to Consolidate [Doc. #31]..

In the 1:02CV00630 case, the following motions are pending: Defendant's Motion to Dismiss [Doc. #3], Defendant's Motion to Consolidate [Doc. #5] and Plaintiff's Motion to Remand [Doc. #8].

For the reasons set forth below, in the 1:00CV00665 action, Plaintiff's Motion to Remand [Doc. #7] is DENIED, Defendant's Motion to Dismiss [Doc. #11] is GRANTED, Plaintiff's Motion to Exclude Evidence and for Leave to Take Discovery [Doc. #25] is MOOT, Plaintiff's Motion to Amend the Complaint [Doc. #28] is DENIED, Defendant's Motion to Consolidate [Doc. #31 is MOOT].

In the 1:02CV00630 case, Defendant's Motion to Dismiss [Doc. #3] is GRANTED, Defendant's Motion to Consolidate [Doc. #5] is MOOT, and Plaintiff's Motion to Remand [Doc. #8] is DENIED.

I.

The allegations of the complaint, stated in the light most favorable to the Plaintiff, are as follows: Plaintiff Albert Freeman was employed by Duke Power from 1983 to 1999 as a Transmission Line Helper and as a Distribution Line Technician C in Burlington, North Carolina. In 1984, Mr. Freeman obtained a limited contractor's license and 'moonlighted' as an electrician during his off duty hours. Mr. Freeman also alleges that Duke Power was aware of his moonlighting and 'utilized Freeman's services as an electrician in the rewiring of Duke Power buildings.' (Cmp. ¶ 7.)

In 1990, Duke Power transferred a district manager, Ed Holt, to Burlington. Holt did not like 'moonlighting' and accused Mr. Freeman of moonlighting during his Duke Power work day. Around January 26, 1994, Mr. Freeman was suspended and discharged from his employment as a lineman for Duke Power "for allegedly 'removing a service drop and meter and disconnecting service to a customer without authorization from Duke Power Company'" while he was moonlighting. (Cmp. ¶ 11). The union filed a grievance on Mr. Freeman's behalf. Mr. Freeman, the Union, and Duke Power settled the grievance and entered into a Grievance Resolution on June 20, 1994. Pursuant to this agreement, Duke Power agreed to reinstate Mr. Freeman with no loss of service but with no back pay. The Union agreed to withdraw the grievance. The parties also agreed that if Mr. Freeman engaged "directly or indirectly in the business of electrical contracting while employed with Duke Power, Duke Power

could terminate Mr. Freeman's employment for that reason," and Duke Power's decision "shall be final and shall not be subject to review under any grievance or arbitration provision under any Collective Bargaining Agreement in effect at the time of his discharge." (Cmp. ¶ 12.) This agreement was signed by the Duke Power area manager for Burlington/Reidsville, the business manager for the Union, and Mr. Freeman.

In June 1996, Duke Power again suspended Mr. Freeman "allegedly for engaging in the business of electrical contracting." (Cmp. ¶ 14). Mr. Freeman denied having breached the June 1994 Grievance Resolution Agreement. In July 1996, Duke Power, the Union, and Mr. Freeman entered into an Amendment to the Grievance Resolution, which provided that Mr. Freeman was prohibited from "being or becoming employed on a full or part-time basis with any person, firm, or corporation engaging in the business of electrical contracting." (Cmp. ¶ 16). In July 1999, Mr. Freeman was terminated for allegedly violating the Amended Grievance Resolution. Mr. Freeman denies that he violated the Amended Grievance Resolution. The Union did not file a grievance on behalf of Mr. Freeman.

Mr. Freeman filed the action against Duke Power in the General Court of Justice Superior Court Division, Alamance County on June 30, 2000. Mr. Freeman alleges numerous causes of action including: breach of contract, wrongful discharge, a violation of Article 1, Section 1 of the North Carolina State Constitution, and bad faith discharge.

Mr. Freeman filed the action against Cindy Thaxton, Regional Human Resources Manager for Duke Power, and Gregory Kwascha, Burlington Area Manager for Duke Power, in the General Court of Justice Superior Court Division, Alamance County on June 28, 2002. In that case, Mr. Freeman seeks recovery for interference with contract and unfair deceptive trade practices. The defendants in both actions filed timely notices of removal.

II.

The defendants have filed motions to consolidate these cases. For purposes of considering the motions to dismiss, the cases will be consolidated. In light of the fact

that the motions to dismiss will be granted, see discussion below, the Defendants' Motions to Consolidate are MOOT.

Mr. Freeman has filed motions to remand the cases to the Superior Court of Alamance County. Title 28 U.S.C. § 1447(c) requires that a case must be remanded to the state court "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c) (West Supp. 2002). In the motion to remand, Mr. Freeman asserts that the complaints are based purely on state law and do not raise any federal issues. Defendants, however, assert that federal jurisdiction in these cases is proper because the complaint alleges a breach of a contract between "an employer and a labor organization representing employees in an industry affecting commerce pursuant to Section 301 of the Labor Management Relations Act" ("LMRA").

Generally, the "well-pleaded complaint" rule requires that the federal question appear on the face of the plaintiff's properly pleaded complaint in order for a federal court to exercise jurisdiction. Caterpillar Inc. v Williams, 482 U.S. 386, 392 (1987). In this case, Mr. Freeman has alleged numerous state law causes of action. Against Duke Power, Mr. Freeman has alleged breach of contract, wrongful discharge in violation of public policy, direct claims under Article 1, Section 1 and Article 1, Section 19 of the North Carolina Constitution, and bad faith discharge. As to Mr. Thaxton and Mr. Kwascha, Mr. Freeman has alleged interference with contract and unfair and deceptive trade practices.

On the face of Mr. Freeman's complaint, he appears to raise only state law claims. However, the general rule that the federal question must appear on the face of the plaintiff's complaint is subject to an important exception; "an 'independent corollary' to the well-pleaded complaint rule is the further principle that 'a plaintiff may not defeat removal by omitting to plead necessary federal questions.'" Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475 (1998) (citations omitted). If a plaintiff has "artfully pleaded" so that federal jurisdiction appears improper, the case may nevertheless be removed if federal law completely preempts a plaintiff's state-law claim because "[o]nce an area of state law has been completely pre-empted, any claim purportedly

based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law." Caterpillar, 482 U.S. at 393.

The defendants assert that Mr. Freeman's complaint, alleging state law causes of action, is actually a suit for breach of labor contract under the LMRA and that federal jurisdiction is proper pursuant to § 301 of the LMRA. Section 301 of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties.

Mr. Freeman asserts that he is not seeking relief based on a collective bargaining agreement but that the Grievance Resolution and the Amended Grievance Resolution ("the agreements") are independent contracts unrelated to the Collective Bargaining Agreement that can be enforced pursuant to state law.

The Fourth Circuit, however, has rejected Mr. Freeman's argument. The Fourth Circuit has held that a settlement agreement that results from an employee grievance filed pursuant to a collective bargaining agreement is not an independent employment contract enforceable pursuant to state law. Rather, such an agreement is a modification or "rider" to the collective-bargaining agreement, which raises a federal question. Davis v. Bell Atlantic-West Virginia, Inc., 110 F. 3d 245, 249 (4th Cir. 1997).

In Davis, the plaintiff had been discharged due to excessive absenteeism. She filed a grievance through the Union pursuant to the collective bargaining agreement. Bell Atlantic, the Union, and Mrs. Davis reached a settlement agreement providing for reinstatement without backpay or damages. The agreement also provided that Ms. Davis would retain the service credit she had received prior to the discharge. Finally, the agreement provided that Ms. Davis would be subject to immediate dismissal for future tardies or absences. Id. Ms. Davis was tardy on numerous occasions

following the execution of the settlement agreement and was terminated.

Ms. Davis filed suit in state court alleging that Bell Atlantic had breached the terms of the collective bargaining agreement and the settlement agreement and also filed a state law tort claim for wrongful discharge. Bell Atlantic removed the case the federal court, and district court denied Ms. Davis' motion to remand on the grounds that the state law claims were preempted by the LMRA. Id.

The Fourth Circuit rejected Ms. Davis' argument that her claim for breach of the settlement agreement was an independent state law claim. Id. at 247. The Fourth Circuit found that the settlement agreement's validity was based upon the collective bargaining agreement because the settlement agreement was reached only through the grievance procedure specified in the collective bargaining agreement. The Court also noted that the settlement specified that Ms. Davis would be credited for her service prior to her initial discharge, and that the service credit "relate[d] to the underlying work relationship between Davis and Bell Atlantic require[d] reference to the collective-bargaining agreement for interpretation and application." Id. at 249.

Mr. Freeman's case mirrors the facts before the Fourth Circuit in Davis. Mr. Freeman, as Ms. Davis, challenged his initial discharge through the initial grievance procedure specified in the collective bargaining agreement. The agreements between Duke Power, Mr. Freeman, and the Union, like the settlement agreement in Davis, provided that Mr. Freeman would be credited for his service prior to the discharge, would not receive back pay, and would be terminated for any future violation of the agreements. As in Davis, the agreements are not independent contracts enforceable under state law but are riders to the collective bargaining agreement. Mr. Freeman's complaint raises issues that "arise under" federal law and federal jurisdiction is proper. The motions to remand are DENIED.

III.

Since jurisdiction is proper pursuant to § 301 of the LMRA, it is now necessary to determine whether the state

law claims alleged by Mr. Freeman are preempted by § 301.[1] In Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983), the Supreme Court explained that "the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" Id. at 23.

However, the Supreme Court has also made it clear that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." Allis-Chalmers v. Lueck, 471 U.S. 202, 211 (1985). The Supreme Court has explained that determining whether a state law claim "is inextricably intertwined with consideration of the terms of the labor contract." Id. at 213 If the state law claim requires an interpretation of the labor contract, then the state law claims would be pre-empted. Thus, it is necessary to consider the causes of action alleged by Mr. Freeman and decide whether resolution of the state law claims would require interpretation of the collective bargaining agreement or riders to the agreement.

Mr. Freeman's first state law claim alleges that Duke Power breached his employment contract. Determining whether Duke Power breached the contract will necessarily involve interpretation of the contract. Thus, it is clear that a breach of counter claim would be preempted. See Allis-Chalmers v. Lueck, 471 U.S. 202, 210-12 (1985) (explaining the preemptive effect of § 301 as applied to breach of counter claims).

Similarly, Mr. Freeman's tortuous interference with contract claim against Ms. Thaxton and Mr. Kwascha is preempted by § 301. The claim stated is for tortuous interference with contract, the elements of which are as follows: (1) a valid contract between plaintiff and a third person; (2) defendants had knowledge of the contract; (3)

---

[1] The collective defendants have attached the grievance settlement agreements and the collective bargaining agreement to their moving papers. Mr. Freeman has filed a motion to strike. Because it is unnecessary to consider these attachments, the motion to strike is MOOT.

defendants intentionally induced the third person not to perform the contract; (4) in doing so defendants acted without justification; and (5) plaintiff was damaged thereby. United Laboratories, Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E. 2d 375, 387 (1988). In the complaint, Mr. Freeman alleges that Ms. Thaxton and Mr. Kwascha "exceeded their authority," recommended his dismissal "without proper investigation and without a thorough review of the facts", and "acted outside the scope of their employment." Comp. ¶ 11, 12, 17. It will be necessary to analyze the collective bargaining agreement to determine the scope of supervisory authority, the requirements of a proper investigation prior to recommending dismissal, and whether Mr. Freeman's actions violated the riders to the collective bargaining agreement. The tortuous interference with contract claim is preempted.

Next, Mr. Freeman asserts that he was wrongfully discharged in violation of public policy. North Carolina has recognized a claim for wrongful discharge based on public policy as an exception to the employment-at-will doctrine. Coman v. Thomas Manufacturing Co., 325 N.C. 172, 381 S.E. 2d 445 (1989). In the original complaint Mr. Freeman alleged that he was a "member of Local Union 962, International Brotherhood of Electrical Workers, which Union had, at all times relevant hereto, a collective bargaining agreement with the Defendant Duke Power." Comp. ¶ 4. Because wrongful discharge in violation of public policy is an exception to the at-will doctrine, the North Carolina Court of Appeals has held that contract employees cannot state a cause of action for wrongful discharge in violation of public policy. Houpe v. City of Statesville, 128 N.C. App. 334, 343, 497 S.E.2d 82, 88 (1998) (citations omitted) (explaining that [w]rongful termination may be asserted "only in the context of employees at will," and not by an employee "employed for a definite term or… subject to discharge only for 'just cause'").

Mr. Freeman filed a motion to amend his complaint pursuant to Federal Rule of Civil Procedure 15(a) to allege that he was an "at will employee."[2] Determining whether Mr.

---

[2] The Motion to Amend is DENIED. The Fourth Circuit has explained that proposed amendments may be denied on the basis of futility if the claims the plaintiff seeks to add would not survive a

Freeman was an at will employee who could bring a wrongful discharge action would require consideration of the terms of the collective bargaining agreement and the grievance settlement agreements. As such, Mr. Freeman's claim that he was wrongfully discharged is preempted by § 301. Mr. Freeman also alleges that Ms. Thaxton and Mr. Kwascha's conduct regarding his termination constitute an unfair and deceptive trade practice under North Carolina law. Assuming that an unfair and deceptive trade practice claim would not be preempted by § 301, Mr. Freeman has failed to state a claim for relief. To state a claim for relief for unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1, a plaintiff must show (1) an unfair or deceptive act or practice by the defendant, (2) in or affecting commerce, (3) which proximately caused actual injury to plaintiff. Miller v. Nationwide Mut. Ins. Co., 112 N.C. App. 295, 435 S.E.2d 537 (1993). As the North Carolina Supreme Court has explained, the Unfair and Deceptive Trade Practices Act was intended to benefit consumers, Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 469, 343 S.E.2d 174, 179 (1986). The North Carolina Court of Appeals has explained that "employer-employee relationships do not fail within the intended scope" of Chapter 75 because "[e]mployment practices fall within the purview of other statutes adopted for that express purpose." Buie v. Daniel International, 56 N.C.App. 445, 448, 289 S.E.2d 118, 119-120 (1982). It is undisputed that Mr. Freeman's claims arise from his employment. The defendants' motion to dismiss the unfair and deceptive trade practices act claim is GRANTED.

Mr. Freeman has also alleged a claim for bad faith discharge and direct claims under Article I, Section 1 and 10. North Carolina does not recognize an independent tort for bad faith discharge. Amos v. Oakdale Knitting Co., 331 N.C. 348, 359, 416 S.E.2d 166, 173 (1992). Duke Power's Motion to Dismiss the bad faith discharge claim is GRANTED and the claim is DISMISSED.

Article I, Section 1 of the North Carolina Constitution provides:

---

motion to dismiss. See Burns v. AAF-McQuay, Inc., 166 F.3d 292, 294-95 (4th Cir. 1999).

> We hold it to be self-evident that all persons are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

Mr. Freeman asserts that the "moonlighting" provision of the settlement agreements violates the "fruits of their own labor" provision of Article I, Section1 of the North Carolina Constitution. The North Carolina Court of Appeals, however, has previously rejected the argument holding that Article I, Section 1 "does not give [the plaintiff] a remedy against a corporate defendant" in a private dispute. Teleflex Information Systems, Inc. v. Arnold, 132 N.C. App. 689, 693, 513 S.E.2d 85, 88 (1999) (citing Real Estate Licensing Board v. Aikens, 31 N.C. App. 8, 13, 228 S.E.2d 493, 496 (1976) and explaining that the "fundamental provisions of our State Constitution, such as Article I, Section 1, were inserted to guarantee the right to pursue ordinary and simple occupations free from *governmental regulation*") (emphasis added) (international quotations omitted). Duke Power's Motion to Dismiss the Article I, Section 1 claim is GRANTED and the claim is DISMISSED.

Article I, Section 19 of the North Carolina Constitution, often referred to as the Law of the Land Clause, is considered the equivalent of the Due Process Clause of the United States Constitution. Lorbacher v. Housing Authority of the City of Raleigh, 127 N.C.App. 663, 674-75, 493 S.E.2d 74, 81 (1997). A direct claim under the North Carolina Constitution can be made in the absence of an adequate legal remedy. Corum, 330 N.C. at 782, 413 S.E.2d at 289. As discussed below, Mr. Freeman was entitled to seek relief pursuant to § 301 of the LMRA. He is not without an adequate legal remedy and thus cannot state a claim directly under the North Carolina Constitution. Duke Power's Motion to Dismiss the Article I, Section 19 claim is GRANTED and the claim is DISMISSED.

IV.

Finally, because Mr. Freeman's state law claims are preempted by § 301 of the LMRA, it is necessary to

determine whether Mr. Freeman has stated a viable claim under § 301 which allows an aggrieved employee the right to bring a suit in federal court. To state a claim against an employer for breach of a collective bargaining agreement under § 301, the employee must first "attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement." Vaca v. Sipes, 386 U.S. 171, 184 (1967). If those administrative remedies have been exhausted, the plaintiff must also establish that "the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." Id. at 186.

In this case, it is not necessary to consider whether Mr. Freeman has satisfied these two prongs because he did not file his action within the applicable time period. A six month statute of limitations controls a suit brought under § 301 alleging a breach of contract against the employer and failure if proper representation against the union. DelCostello v. Int'l Bhd of Teamsters, 462 U.S. 151, 172 (1983). Mr. Freeman was terminated in July 1999. His action in the state court was filed June 30, 2000, outside the six month statute of limitations. The defendants' Motions to Dismiss are GRANTED, and this case is DISMISSED.

V.

In summary, in the 1:00CV00665 action, Plaintiff's Motion to Remand [Doc. #7] is DENIED, Defendant's Motion to Dismiss [Doc. #11] is GRANTED, Plaintiff's Motion to Exclude Evidence and for Leave to Take Discovery [Doc. #25] is MOOT, Plaintiff's Motion to Amend the Complaint [Doc. #28] is DENIED, Defendant's Motion to Consolidate [Doc. #31] is MOOT.

In the 1:02CV00630 case, Defendant's Motion to Dismiss [Doc. #3] is GRANTED, Defendant's Motion to Consolidate [Doc. #5] is MOOT, and Plaintiff's Motion to Remand [Doc. #8] is DENIED.

This is the 15th day of August, 2003.

/s/
United States District Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALBERT L. FREEMAN, *Plaintiff-Appellant,* v. DUKE POWER COMPANY, a Division of Duke Energy Corporation; DUKE ENERGY CORPORATION, *Defendants-Appellees.*	No. 03-2146

ALBERT L. FREEMAN, *Plaintiff-Appellant,* v. CINDY THAXTON; GEORGE KWASCHA, *Defendants-Appellees.*	No. 03-2147

Appeals from the United States District Court
for the Middle District of North Carolina, at Durham.
N. Carlton Tilley, Jr., Chief District Judge.
(CA-00-665-1; CA-02-630-1)

Argued: June 4, 2004

Decided: September 27, 2004
Before WIDENER and SHEDD, Circuit Judges, and
David R. HANSEN, Senior Circuit Judge of the
United States Court of Appeals for the Eighth Circuit,
sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Fred Thurman Hamlet, Sr., Greensboro, North Carolina, for Appellant. Dena Beth Langley, NEXSEN PRUET ADAMS KLEEMEIER, P.L.L.C., Greensboro, North Carolina, for Appellees.
ON BRIEF: Brian S. Clarke, NEXSEN PRUET ADAMS KLEEMEIER, P.L.L.C., Greensboro, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The district court dismissed both of Albert Freeman's state law actions, one against Duke Power Company (Duke Power) and one against Cindy Thaxton and George Kwascha, on the bases that all of the state law claims raised in the two cases were either preempted by § 301 of the Labor Management Relations Act (LMRA) and failed to state claims under the LMRA, or, if not preempted, failed to state a claim under state law. Freeman appeals, and we affirm.

I.

Because the district court granted the defendants' motions to dismiss the plaintiff's complaints for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), we take the allegations in the complaints as true and construe the facts in the light most favorable to the plaintiff. *Franks v. Ross*, 313 F.3d 184, 192 (4th Cir. 2002). Albert Freeman worked for Duke Power as a Transmission Line Helper and as a Distribution Line Technician C from 1983 until 1999 pursuant to a collective bargaining agreement (CBA) between Duke Power and Freeman's union, Local Union 962, International Brotherhood of Electrical Workers (Union). In 1984, Freeman obtained a limited electrical contractor's license and "moonlighted" as an electrician during his off-

duty time performing small electrical jobs. Duke Power was aware of Freeman's moonlighting activities and took no employment action against him between 1984 and 1994.

In January 1994, Freeman was suspended and discharged from employment as a lineman "for allegedly removing a service drop and meter and disconnecting service to a customer without authorization from Duke Power Company." (J.A. at 11-12.) The Union filed a grievance on Freeman's behalf pursuant to the grievance procedures of the CBA. In settlement of the grievance, Duke Power, the Union, and Freeman entered into a Grievance Resolution, under which Duke Power agreed to reinstate Freeman to his lineman position, the Union agreed to withdraw the grievance, and Freeman agreed not to engage, directly or indirectly, in the business of electrical contracting while employed with Duke Power. The Grievance Resolution provided that Duke Power could discharge Freeman if he engaged in electrical contracting, and that the discharge decision would be final and would not be subject to the grievance procedures of the CBA in effect at the time of any future discharge.

In June 1996, Duke Power suspended and proposed to discharge Freeman a second time, asserting that Freeman violated the Grievance Resolution by engaging in electrical contracting. Freeman asserted that he did not violate the Grievance Resolution. In settling the dispute, the Union, Duke Power, and Freeman entered into an Amendment to the Grievance Resolution (Amendment) on July 3, 1996. The Amendment prohibited Freeman from being or becoming employed on a full- or part-time basis with any entity engaged in the business of electrical contracting. In the Amendment, Duke Power agreed not to terminate Freeman for the then current alleged violation of the Grievance Resolution, and Freeman agreed not to engage in the business of electrical contracting in the future. The Amendment provided that Duke Power could terminate Freeman's employment if he violated the Amendment, and that such termination would be final and would not be subject to the arbitration or grievance procedures under the CBA then in effect. In July 1999, Duke Power suspended and ultimately discharged Freeman for allegedly violating the Amendment.

The Union declined to file a grievance for Freeman.

Freeman brought an action in North Carolina state court against Duke Power, alleging breach of contract, wrongful discharge, violations of North Carolina's constitution, and bad faith discharge. He brought a separate state court action against Cindy Thaxton and George Kwascha, his immediate supervisors, for interference with contract and violation of North Carolina's unfair and deceptive trade practices act. The defendants in both cases removed the cases to federal court and filed motions to dismiss the cases for failure to state a claim. The defendants also sought to consolidate the cases in federal court. Freeman resisted the motions and moved to remand the cases back to state court, to amend his complaint, to exclude evidence attached to the defendants' motions to dismiss, and to conduct discovery.

The district court denied Freeman's motion to remand the cases to state court because the complaints in both cases raised issues arising under federal law, specifically the LMRA. The court determined that Freeman's claims against Duke Power for breach of contract and wrongful discharge were preempted by § 301 of the LMRA and granted the defendants' motions to dismiss because the claims were brought beyond the applicable statute of limitation. The district court denied Freeman's motion to amend his complaint to allege that he was an at-will employee because the allegation would not have changed the fact that the claim was preempted by the LMRA. The district court dismissed the bad faith discharge and state constitutional claims as failing to state claims cognizable under North Carolina law.

The district court determined that Freeman's claim against the individual defendants for interference with contract was also preempted by the LMRA and subject to dismissal as untimely. It determined that even if the unfair and deceptive trade practices claim was not preempted by the LMRA, such a claim was unavailable under North Carolina law in the employment setting. The district court found that the defendants' motions to consolidate and Freeman's motions to exclude evidence and conduct discovery were all mooted by the dismissals. Freeman appeals.

II.

A. Removal Jurisdiction

Freeman argues on appeal that both of his cases should have been remanded to state court because both complaints raised only state law claims. Actions brought in state court are removable to federal court if the complaint raises a federal question. *See* 28 U.S.C. §§ 1331, 1441(a) (2000). To determine whether a complaint raises a federal question, we apply the "well-pleaded complaint" rule, which prevents a defendant from removing a case to federal court unless the plaintiff's complaint, without consideration of any potential defenses, establishes that the case arises under federal law. *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488, 2494 (2004). A corollary to the wellpleaded complaint rule allows an action to be removed, notwithstanding the absence of a federal question in the plaintiff's complaint, if "a federal statute wholly displaces the state-law cause of action through complete pre-emption." *Id.* at 2495 (internal marks omitted). Even though the action alleges only state law claims, if those claims are completely preempted by federal law, the complaint "is in reality based on federal law." *Id.* (internal marks omitted).

The preemptive force of § 301 of the LMRA is unquestionably broad. *See Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 23-24 (1983). Section 301 totally displaces state causes of action related to contracts between employers and labor organizations, as well as other claims the resolution of which depends substantially on the interpretation of a CBA. *See Davis v. Bell Atlantic-W.V., Inc.*, 110 F.3d 245, 247 (4th Cir. 1997).

1. Action Against Duke Power

The *Davis* case is factually similar to Freeman's case against Duke Power, and its reasoning controls the outcome. In *Davis*, an employee entered a settlement agreement with her employer and union that settled a grievance brought pursuant

to the CBA when the employer attempted to terminate the employee for absenteeism. *Davis*, 310 F.3d at 246. The settlement agreement reinstated the employee and provided that the employee was subject to immediate termination, without recourse to the grievance procedures in the CBA, if she violated the settlement agreement. The employee was subsequently terminated for violating the settlement agreement, and she brought state law claims for breach of the CBA, breach of the settlement, and wrongful discharge. *Id.* As relevant here, this court held that the claim for breach of the settlement agreement was preempted because it depended on rights conferred on the employee by the CBA.[1] The settlement agreement derived from the CBA, in fact was entered as a result of a grievance proceeding brought pursuant to the CBA, and therefore its "entire vitality and legitimacy" drew from the CBA. *Id.* at 248. In the case at bar, the Union followed the grievance procedure in the CBA and entered into settlement negotiations with Duke Power, on Freeman's behalf, that resulted in the Grievance Resolution and Amendment in lieu of arbitration as provided by the CBA. Without the CBA, the Grievance Resolution and Amendment would not have existed. Settlements of employee grievances that are entered pursuant to the terms of a CBA are labor contracts within the meaning of § 301, which "preempts an alleged breach of the Union-negotiated agreement that settled an employee grievance." *Id.* at 249 (citing cases holding same).

Freeman attempts to distinguish *Davis* on the basis that certain terms used in the *Davis* settlement agreement were defined in the CBA, whereas there are no terms in the Grievance Resolution or the Amendment that need to be defined by reference to the CBA. However, the *Davis* court did not rely on the mutuality of terms for its holding. *Id.* ("While an independent employment contract's mere

---

[1] Contrary to Freeman's assertions that the *Davis* court's discussion of the settlement agreement was dicta because Davis alleged breach of the CBA (Appellant's Br. at 21 n.1), the *Davis* court addressed the claims for breach of the CBA and breach of the settlement agreement as distinct claims.

borrowing of one or more terms from a [CBA] does not in itself bring that contract within the scope of § 301 preemption, the settlement agreement here was not an independent employment contract . . . . The Union's [CBA] remained in full force to govern [the employee's] employment relationship except insofar as it was modified by the settlement agreement." (internal citations omitted)). The court construed the settlement agreement as a rider to the CBA. *Id.*

Although disputes arising over independent employment contracts unrelated to a CBA are not preempted by § 301 of the LMRA, *see Caterpillar Inc. v. Williams*, 482 U.S. 386, 394-95 (1987), the Grievance Resolution and the Amendment are not independent of the CBA. The employees in *Caterpillar* had entered separate management contracts and only later became subject to a CBA when they were demoted. Their state law action was based on the management contracts, not anything derivative of the CBA, and thus was not preempted by the LMRA. *Id.* at 395 & n.9. The same cannot be said in the instant case, as the Grievance Resolution and Amendment derive their "entire vitality and legitimacy" from the CBA. *Davis*, 110 F.3d at 248.

The district court also determined that § 301 of the LMRA preempted Freeman's wrongful discharge claim against Duke Power. Freeman alleged in his complaint that Duke Power wrongfully discharged him in violation of North Carolina public policy as reflected in the state constitution, which protects an individual's right to "the enjoyment of the fruits of [his] own labor." N.C. Const. art. I, § 1. Freeman's wrongful discharge claim is preempted by the LMRA if it is "inextricably intertwined with consideration of the terms of the labor contract. If the state tort law purports to define the meaning of the contract relationship, that law is pre-empted." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985).

The Supreme Court of North Carolina has recognized a cause of action for wrongful discharge in violation of public policy as a narrow exception to North Carolina's long-standing employment-at-will doctrine. *See Coman v. Thomas Mfg. Co.*, 381 S.E.2d 445, 447 (N.C. 1989). However, "[t]he tort of

wrongful discharge arises only in the context of employment at will." *Claggett v. Wake Forest Univ.*, 486 S.E.2d 443, 448 (N.C. Ct. App. 1997) (dismissing wrongful discharge claim brought by a university professor who was covered by a contract). Contract employees are limited to contract remedies. Resolution of the wrongful discharge claim would require a determination of the type of employment relationship between Freeman and Duke Power, regardless of whether Freeman pleads that he is a contract employee or an at-will employee. Such an analysis necessarily would involve construction of the CBA, the Grievance Resolution, and the Amendment to determine what type of employment relationship existed between Freeman and Duke Power. The wrongful discharge claim is therefore preempted by the LMRA. *Allis-Chalmers*, 471 U.S. at 213.

Because Freeman's claims of breach of contract and wrongful discharge are preempted by § 301 of the LMRA and therefore raise a federal question, the district court properly retained jurisdiction over Freeman's case against Duke Power, and no remand to state court was in order.

2. Action Against Thaxton & Kwascha

Freeman brought state law claims of tortious interference with contract and unfair and deceptive trade practices against two of his supervisors, alleging that they intentionally induced Duke Power to terminate his employment. The district court determined that the interference with contract claim was completely preempted by § 301 because it required interpretation of Thaxton's and Kwascha's supervisory authority as defined in the CBA, as well as a determination of whether Freeman violated the Grievance Resolution and Amendment. We agree.

As discussed above, a state law claim is completely preempted by the LMRA if it relates to contracts between employers and labor organizations, or if resolution of the claim depends substantially on the interpretation of a CBA. *See Davis*, 110 F.3d at 247. To state a claim for tortious interference with contract against Thaxton and Kwascha under North Carolina law, Freeman had to establish that (1)

he had a valid contract with Duke Power that gave Freeman contractual rights; (2) the defendants knew of the contract; (3) the defendants intentionally induced Duke Power not to perform the contract; (4) the defendants acted without justification; and (5) Freeman was thereby damaged. *Embree Const. Group, Inc. v. Rafcor, Inc.*, 411 S.E.2d 916, 924 (N.C. 1992).

Freeman stated in his complaint that he had an employment agreement with Duke Power that gave him certain legal rights and privileges, that Thaxton and Kwascha intentionally induced Duke Power to terminate the contract, and that Thaxton's and Kwascha's conduct was outside of the scope of their employment (as Freeman's supervisors), in bad faith, for a wrongful purpose, with malice, and without any legal justification. (J.A. at 231-32.) A court would need to interpret the Grievance Resolution, the Amendment, and the CBA in an effort to determine Freeman's contractual rights, the extent of Thaxton's and Kwascha's supervisory authority, and whether Duke Power failed to perform its obligations to Freeman. We therefore hold that Freeman's claim against Thaxton and Kwascha for tortious interference with contract was preempted by § 301 of the LMRA. *See Int'l Union, United Mine Workers of Am. v. Covenant Coal Corp.*, 977 F.2d 895, 899 (4th Cir. 1992) ("Clearly, the third element of this cause of action [under Virginia law], requiring a breach or termination of the contractual relationship, necessitates interpretation of the [CBA]."); *Steinbach v. Dillon Cos.*, 253 F.3d 538, 540 (10th Cir. 2001) (holding that a tortious interference claim alleging that a third party caused the employer to wrongfully terminate an employee was preempted by § 301 where the claim required a determination of whether the employer failed to perform the contract); *Kimbro v. Pepsico, Inc.*, 215 F.3d 723, 727 (7th Cir. 2000) (holding that an employee's state law claims for tortious interference with contract against a supervisor and a third party were preempted by § 301 where the claims would require interpretation of the CBA). The district court properly exercised jurisdiction over Freeman's case against Thaxton and Kwascha.

B. Dismissal for Failure to State a Claim

Having determined that the district court properly exercised jurisdiction over both of Freeman's complaints, we turn now to the district court's dismissal of each of his claims. Where state law claims are preempted by the LMRA, the claim may still survive if it states a claim under the federal statute. *See Allis Chalmers Corp.*, 471 U.S. at 220 ("[The] claim must either be treated as a § 301 claim, . . . or dismissed as pre-empted by federal labor-contract law.").

1. Claims Against Duke Power

a. Breach of Contract/Wrongful Discharge

The district court dismissed Freeman's claims against Duke Power for breach of contract and wrongful discharge for failing to state a § 301 claim because both claims were brought outside of the applicable statute of limitations, borrowing the six-month limitation period contained in § 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b) (2000). If a federal statute is silent as to the applicable statute of limitations, we generally borrow the most analogous state limitations period. *See DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983). To avoid frustrating federal policy, however, courts should borrow a limitations period from an analogous federal statute if that statute clearly provides a closer analogy than available state statutes. *Id.* at 172.

The NLRA proscribes "unfair labor practices" and provides a sixmonth period within which to bring an unfair labor practices claim. 29 U.S.C. § 160(b). The six-month period takes into account "the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system." *DelCostello*, 462 U.S. at 171 (internal marks omitted).

In this case, Freeman twice settled grievances filed on his behalf by the Union with Duke Power. The settlements provided that Duke Power could terminate Freeman for

engaging in electrical contracting, and that Duke Power's decision to do so "shall be final." (J.A. at 12.) Freeman's claims for breach of contract and wrongful discharge challenge Duke Power's decision to terminate his employment despite his agreement in the settlement negotiations that Duke Power's decision would be final. Allowing Freeman to use the three-year statute of limitation provided under North Carolina law for breach of contract claims would undermine the NLRA's delicate balance between the competing interests of promoting the finality of private settlements and avoiding unjust settlements. *See DelCostello*, 462 U.S. at 171. The district court appropriately borrowed the NLRA's six-month statute of limitation and properly dismissed the breach of contract and wrongful discharge claims as being brought outside of that period.

b. Direct Claims Under the State Constitution

Freeman asserted in the third count of his complaint that Duke Power's actions in limiting his ability to moonlight violated the North Carolina constitutional provision recognizing the inalienable right of all persons to "the enjoyment of the fruits of their own labor." N.C. Const. art. I, § 1. North Carolina's courts do not recognize a cause of action based on article I, section 1 of the state constitution to remedy private employment disputes. *See Teleflex Info. Sys., Inc. v. Arnold*, 513 S.E.2d 85, 88 (N.C. Ct. App. 1999) (affirming summary judgment for employer in suit brought by at-will employee claiming that his firing violated article I, section 1 of the state constitution). Rather, the provision limits *the state's* ability to regulate an individual's livelihood. *Id.* ("[T]he declaration of rights in [the North Carolina] State Constitution was inserted 'chiefly to protect the individual *from the State*.'" (quoting *North Carolina v. Ballance*, 51 S.E.2d 731, 734 (1949))). Thus, the district court properly dismissed Freeman's state constitutional claim.

Likewise, Freeman's direct cause of action under article I, section 19 of the state constitution, providing that no person shall be deprived of his property but by the law of the land, also fails. Article I, section 19 is the North Carolina state constitution's equivalent of the federal Constitution's

Fourteenth Amendment due process clause. Both provisions protect individuals only against governmental action. Thus, Freeman has no cognizable action based on the state constitution against his wholly private employer. *See N.C. Nat'l Bank v. Burnette*, 256 S.E.2d 388, 394 (N.C. 1979) ("This constitutional [due process] shield does not protect citizens from the actions or activities of other private individuals."); *Weston v. Carolina Medicorp, Inc.*, 402 S.E.2d 653, 656-57 (N.C. Ct. App. 1991) ("'[S]tate action' is required to trigger the protections of the 'synonymous' due process provisions of the Fourteenth Amendment to the United States Constitution and Article 1, § 19 of the North Carolina Constitution."). The district court properly dismissed Freeman's third count.

c. Bad Faith Discharge

Freeman argues that North Carolina courts are "undecided" as to whether a bad faith discharge claim is separately cognizable in North Carolina. The Supreme Court of North Carolina, however, unequivocally stated, in disagreeing with two of the federal district court cases relied upon by Freeman, that it "did not recognize a separate claim for wrongful discharge in bad faith" in a prior case. *Amos v. Oakdale Knitting Co.*, 416 S.E.2d 166, 173 (N.C. 1992). The district court properly dismissed Freeman's fourth count against Duke Power.

2. Claims Against Thaxton and Kwascha

a. Tortious Interference With Contract

Because the tortious interference claim is preempted, Freeman's claim must be dismissed unless it states a valid § 301 claim. Section 301 allows claims for "violations of contracts between an employer and a labor organization." 29 U.S.C. § 185 (2000). "Applying the most natural interpretation of this language, we [have previously held] that a suit against a non-signatory of a contract cannot be considered a suit for violation of the contract." *Covenant Coal Corp.*, 977 F.2d at 897. Bound, as both it and we are by prior controlling and unquestioned circuit precedent, the district court properly dismissed Freeman's claim against

Thaxton and Kwascha for interference with contract.

b. Unfair and Deceptive Trade Practices

To state a claim for unfair and deceptive trade practices against Thaxton and Kwascha under North Carolina General Statutes § 75-1.1, Freeman must establish that (1) the defendants "committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 548 S.E.2d 704, 711 (N.C. 2001). "The purpose of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State[,] and [it] applies to dealings between buyers and sellers at all levels of commerce." *Sara Lee Corp. v. Carter*, 519 S.E.2d 308, 311 (N.C. 1999) (internal marks omitted) (alterations in original). The statute generally does not apply to employment situations, *see Dalton*, 548 S.E.2d at 711, though the existence of an employment relationship will not necessarily defeat a claim if the parties are otherwise involved in a business relationship. *See Sara Lee Corp.*, 519 S.E.2d at 312 (allowing an unfair trade practices claim brought by an employer against an employee where the employee was involved in buyer-seller transactions with his employer).

Freeman's complaint alleges only that the individual defendants acted to cause Duke Power to terminate Freeman's employment contract. (J.A. at 232-34.) Although N.C.G.S. § 75-1.1(b) defines "commerce" broadly as "business activities, however denominated," the Supreme Court of North Carolina has cautioned that the act "is not intended to apply to all wrongs in a business setting," including most employment disputes. *Dalton*, 548 S.E.2d at 657 (distinguishing *Sara Lee* on the basis that the employee in *Sara Lee* owed a fiduciary duty to his employer, and the employee was entrenched in a buyer-seller relationship with his employer, which fell squarely within the purview of the unfair trade practices act). Freeman's allegation that the defendants caused Duke Power to terminate him fails to meet the requirement that the defendants' acts be in or affecting commerce, *see Durling v. King* 554 S.E.2d 1, 4-5 (N.C. Ct.

App. 2001) (affirming summary judgment where "no evidence was presented that the subject transactions had any impact beyond the parties' employment relationships"), and he therefore failed to state a claim under the state unfair and deceptive trade practices act.

III.

We affirm the district court's order denying Freeman's motions to remand and dismissing Freeman's complaints against Duke Power and against Thaxton and Kwascha. We also affirm the district court's denial of the various pending motions as the dismissal of all claims makes the motions moot.

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 26, 2004

No. 03-2146
CA-00-665-1

ALBERT L. FREEMAN,
Plaintiff-Appellant,

v.

DUKE POWER COMPANY, a division
Of DUKE ENERGY CORPORATION,
and DUKE ENERGY CORPORATION,
Defendants-Appellees.

No. 03-2147
CA-02-630-1

ALBERT L. FREEMAN,
Plaintiff-Appellant,

v.

CINDY THAXTON, an individual,
and GREGORY KWASCHA,
an individual,
Defendants-Appellees.

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Widener, Judge Shedd, and Judge Hansen.

For the Court,

/s/ Patricia S. Connor

Clerk